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No. 86-275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, BUREAU OF PUPIL TRANSPORTATION, and LEONARD A. DAVID,

Petitioners,

-against-

STUART STEIN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SHNEYER & SHEN, P.C.
Attorney for Respondent
250 West 100th Street
New York, New York 10025-5333
(212)316-2700

PAUL A. SHNEYER,
Of Counsel.

September 18, 1986

TABLE OF CONTENTS

	Page
Table of Authorities	i
ARGUMENT	1
The Petition for a Writ of Certiorari Should Be Denied.....	1
Respondent Was Entitled to Due Process Protection of the Fourteenth Amendment..	2
Conclusion.....	11

TABLE OF AUTHORITIES

Cases:	Page
Board of Regents v. Roth, 408 US 564 (1972).....	2, 6, 8
Cafeteria Workers v. McElroy, 367 US 886, rehearing denied, 368 US 869 (1961).....	8, 9
Connell v. Higginbotham, 403 U.S. 207 (1971).....	3
Greene v. McElroy, 360 US 474 (1959).....	4
Lawson v. Greenburgh Central School District, 50 AD 2d 893 (2d Dept., 1975).....	4
Slochower v. Board of Education, 350 U.S. 551 (1956).....	3
Weiman v. Updegraff, 344 U.S. 183 (1952).....	3

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ARGUMENT

The Petition for a Writ of Certiorari Should Be Denied

The decision of the Court of Appeals[1] was consistent with the previous holdings and principles set

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1. The opinion of the Court of Appeals is reported at 792 F.2d 13 (2d Cir. 1986) and is reproduced in the Petition for Certiorari, cited herein as "Pet. App."

forth by this Court in Board of Regents v. Roth, 408 U.S. 564, (1972), regarding an individual's right to procedural due process prior to being deprived of an interest in property as a result of governmental action.

RESPONDENT WAS ENTITLED TO THE DUE PROCESS PROTECTIONS OF THE FOURTEENTH AMENDMENT

(1)

The requirements of procedural due process apply to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. Board of Regents v. Roth, 408 U.S. at 569-70 (1972).

To claim a protected property interest the claimant must have a legitimate claim of entitlement to the

benefit which he is being deprived of. Id., 408 U.S. at 577. This Court has held that tenured public college professors [Slochower v. Board of Education, 350 U.S. 551 (1956)], college professors and staff members dismissed during the term of their contract, [Weiman v. Updegraff, 344 U.S. 183 (1952)], and a teacher without a formal contract but with a clearly implied promise of continued employment, [Connell v. Higginbotham, 403 U.S. 207 (1971)] all have an interest in continued employment that are safeguarded by the due process clause of the Fourteenth Amendment.

The fact that an individual is not directly employed by the governmental agency, which has made a determination negatively affecting the individual's employment with a private employer, does not eliminate the necessity of notice

and a hearing before the employee is found to be undesireable by the governmental agency. Greene v. McElroy, 360 U.S. 474 (1959).

The New York State Supreme Court, Appellate Division, Second Department has held, in a case involving the dismissal of a privately employed school bus driver, driving public school runs, that the substantial control over hiring and dismissal of school bus drivers by the local school district was sufficient to require the court to determine if the bus driver had a property right which had been infringed by his dismissal. Lawson v. Greenburgh Central School District, 50 A.D.2d 893 (2d Dept. 1975).

Respondent Stein was employed by A.C.J. Transportation Corp. (hereinafter "ACJ") pursuant to a written contract between ACJ and Stein's certified

collective bargaining representative (hereinafter "the Union"). The contract provided that respondent would not be removed from his employment except for just cause.

Respondent Stein's discharge was caused by Petitioner Board of Education, which, by disqualifying respondent, foreclosed him from continuing to drive for ACJ thereby depriving him of his property right to continued employment. Respondent's claim of entitlement arose from the contract between ACJand the Union.

The Court of Appeals noted that "liberty" or "property" protected by due process need not always flow from guarantee under state law or the Constitution. (Pet. App. A-16). The Court correctly held that where the independent source of a property interest is a private contract, the

state cannot impede or interfere with the claim of entitlement to continued employment without due process of law. (Pet. App. A-16)

Based on respondent Stein's contract with ACJ, Stein had a legitimate expectancy of continued employment. Respondent's expectancy of continued employment is a property interest entitling him to due process protections when a governmental agency infringes on his employment. Board of Regents v. Roth, supra.

The infringement by the Board is undisputed. The Board's action prevented respondent from continuing to work as a bus driver on Board runs. Since the Board's action resulted in the infringement of Stein's right to continued employment as a bus driver under the Union contract, the

deprivation to which Stein was subjected must meet the Constitutional requirements of due process.

If overturned, the decision potentially could effect a dangerous infringement on due process protections. The case at bar, for example, is not analogous to and does not reach as far as assuring protection for an applicant to a state license nor is it a simple matter of contract enforcement, as petitioners suggest.

(2)

Respondent Stein had a liberty interest which the Board of Education could not infringe upon without affording him procedural due process. The finding of the Board of Education that he fell below the standards of "good moral character" tainted his chances of obtaining other employment involving the transportation of

students. (Pet. Aff. A-14).

In Board of Regents v. Roth, supra, this Court recognized that the loss of employment may involve liberty as well as property interests:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case." 408 U.S. at 573.

In Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961) this Court held that a cook employed by a private company who was barred from working at a naval facility by the commanding officer did not have a constitutional right to notice and a hearing before being barred. The Court reasoned, however, that consideration

for due process procedures must include the precise nature of the government function as well as the private interest that has been affected by the governmental action. Cafeteria & Restaurant Workers, supra, at 895.

The Court of Appeals below distinguished Cafeteria Workers from the case at bar by noting that the employee in that case had not been discharged by the company and revocation of clearance did not "bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment." (Pet. App. A-13).

In the instant case, however, respondent's discharge was based on a written finding that he fell below the standards of "good moral conduct." The taint of such findings infringed upon Stein's liberty interests. It was imperative that respondent be accorded

the due process protections of advance written notice of the charges against him so as to properly prepare a defense.

Accordingly, the Court of Appeals was correct in affirming the finding of liability against petitioners that the respondent had a protected property interest and the petitioners had violated his procedural due process rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: September 18, 1986

Respectfully submitted,

Paul A. Shneyer, Esq.
Shneyer & Shen, P.C.
250 West 100th Street
New York, NY 10025-5333
(212)316-2700

Attorneys for
Respondent Stein